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No. 87-998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,

Appellant,

v.

J. A. CROSON COMPANY,

Appellee.

BRIEF OF THE STATES OF NEW YORK, CALIFORNIA, CONNECTICUT, ILLINOIS, MASSACHUSETTS, MINNESOTA, NEW JERSEY, OHIO, OREGON, RHODE ISLAND, SOUTH CAROLINA, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING and the DISTRICT OF COLUMBIA

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INTEREST OF *AMICI CURIAE*

Amici States and the District of Columbia respectfully submit this brief in support of the appellant City of Richmond. *Amici* urge this Court to reverse the judgment of the court below and thus affirm states' and localities' discretion to fashion necessary and appropriate race-conscious remedial measures, such as the City of Richmond's Minority Business Utilization Plan, in order to redress racial discrimination.

Amici recognize the paramount importance of remedying racial discrimination. Substantial progress has been made in overcoming this Nation's legacy of slavery, in significant part as a result of race-conscious remedial measures. That progress will be seriously undercut if governmental entities are deprived of latitude in devising means "to eliminate so far as possible the last vestiges of an unfortunate and ignominious page in this country's history." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). *Amici* have an interest in this case because they need to preserve their ability as public entities to make decisions regarding the awarding of public contracts in an arena -- the construction trade -- where purposeful discrimination long ruled.

Programs, such as the Richmond Plan, which set aside a certain percentage of public construction contracts for minority business enterprises represent a valid exercise of states' and localities' power to decide how the public's money should be spent so as to ensure that all segments of their communities, particularly those minorities historically discriminated against, shall have a realistic opportunity to compete for contracts. It cannot be disputed that the construction industry experienced long-term and pervasive discrimination and that the effects of that discrimination still linger. Set-aside programs not only create new opportunities for minority business enterprises, but do so in a way that minimally burden the rights and fair expectations of non-minorities. To require government entities to point to their own participation in past discriminatory practices as a predicate for developing such plans is not only unnecessary, but creates a powerful disincentive against such efforts, thus running the risk of perpetuating an unjust *status quo*.

Amici have initiated set-aside programs with goals similar to those in the Richmond Plan.[1] *Amici* have a strong interest in

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[1] *See* N.Y. Exec. Order 21 (1983); N.Y. Pub. Auth. Law § 1266-c 14(a)(i) (McKinney 1986); N.Y. Transp. Law § 428(2) (McKinney 1983); N.Y. Unconsol. Laws § 6267 (McKinney 1983); Cal. Gov't Code § 8790.70 *et seq.* (West 1988); Cal. Gov't Code § 14132, eff. Jan. 1, 1989, 1988 Cal. Stats. Ch. 9; Cal. Gov't Code § 16850, eff. Jan. 1, 1989, 1988 Cal. Stats. Ch. 61; Cal. Pub. Cont. Code § 10108.5 (West 1988); Cal. Pub. Cont. Code § 10115, eff. Jan. 1, 1989, 1988 Cal. Stats. Ch. 61; Cal Pub. Cont. Code § 10470 (West 1988); Conn. Gen.

(Footnote Continued)

ensuring that they will continue to exercise discretion in the initiation and implementation of these programs.

The State of New York, by Robert Abrams, Attorney General of the State of New York, and other *Amici* submit this brief pursuant to Supreme Court Rule 36.4.

SUMMARY OF ARGUMENT

Even under the most rigorous standard of scrutiny, Richmond's Minority Business Utilization Plan must be upheld. The City's compelling interest in eradicating past discrimination and its present effects in the local construction industry justified the enactment of a set-aside program for minority business enterprises ("MBEs"). In approving such a plan, the City Council was not constitutionally required to engage in the detailed kind of factfinding or record compilation that courts must employ. Legislative bodies have more latitude than courts in devising remedies to redress racial discrimination because their responsibility to set social policy is so much broader. In addition, the Fourth Circuit was wrong to hold that the City, in order to justify its set-aside, would have to point to evidence of its own complicity in past racial discrimination. Such a requirement would act as a powerful disincentive against the enactment of such programs, thus undermining society's strong interest in encouraging voluntary efforts to end racial discrimination. Accordingly, states and localities need only have a "firm basis" for believing that remedial action is needed. *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842, 1856 (1986) (O'Connor, J., concurring) ("*Wygant*").

In this respect, the powers and duties of states and localities are analogous to those of Congress, whose authority to enact

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Stat. § 32-9e(b) (1987); D.C. Code § 1-1141 *et seq.* (1987 Repl. Vol.); Ill. Rev. Stat. Ch. 127 ¶ 132-600 *et seq.* (1985); Mass. Gen. Laws Ann. Ch. 23A § 39-44 (West Supp. 1988) and Exec. Order No. 237, Mass. Admin. Reg. 509 (1984); Minn. Stat. § 16B.19(5)(6) (1986); N.J. Stat. Ann. 58:11B-26, 5:12-186 (West Supp. 1987); Ohio Rev. Code Ann. §§ 122.71E, 123.151, 125.081; Oreg. Stat. §§ 279.059, 200.005, 200.045; R.I. Gen. Laws 37-14.1-1 *et seq.*; S.C. Act # 170 (1987), § 11-35-5010 of Code of Laws of S.C. (1976, as amended); Wash. Rev. Code § 39.19, Wash. Admin. Code R § 326-30-039; Wis. Stat. §§ 560.036, 16.75(3M), 16.855 (10M), 16.87(2) (1985-86).

an MBE set-aside program for public works projects was upheld in *Fullilove v. Klutznick*, 448 U.S. 448 (1980) ("*Fullilove*"). It is particularly appropriate for state and local governments to enact MBE set-aside programs in the context of the construction trade because of extensive evidence of prior and continuing discrimination in that industry adduced by Congress in hearings on the Public Works Employment Act. That evidence concerned not only discrimination on a nationwide basis, but at the state and local level as well. *Fullilove*, 448 U.S. at 478. Richmond, however, did not rely entirely on the congressional findings, but acquired evidence on its own, generated from a hearing and an examination of local records and statistics. This process formed a reasonable basis for the City's enactment of its MBE set-aside programs.

States and localities are not limited under the Constitution to implementing the narrowest possible programs, but can use their discretion to select means that are equitable and reasonably necessary to redress discrimination. Under the standards enunciated by this Court in *United States v. Paradise*, 107 S. Ct. 1053, 1067 (1987) (plurality opinion) ("*Paradise*"), it is clear that Richmond's set-aside program is sufficiently narrowly tailored to achieve its goals.

First, the 30% set-aside figure, which is roughly halfway between the less-than-1% award of contracts to minority firms and the city's 50% minority population, is analogous to the 10% set-aside figure of the MBE set-aside in the Public Works Employment Act. These figures "necessarily involve a degree of approximation and imprecision," *Paradise*, 107 S. Ct. at 1072 (Powell, J., concurring), but are well within the discretionary competence of the legislative bodies involved. Second, the Richmond Plan is flexible, having waiver provisions which are more generous than those of the federal plan upheld in *Fullilove*. Lastly, the burden imposed on third parties by the Richmond Plan is diffuse, having less impact on the legitimate expectations of non-minorities than race-conscious hiring or promotion goals upheld by this Court.

Finally, an affirmance of the Fourth Circuit opinion would produce the anomalous result of federal and state/local set-aside programs being judged by different constitutional standards.

Such a situation would not only be irrational, but could prove administratively unworkable.

ARGUMENT

POINT I

STATES AND LOCALITIES SHOULD NOT BE REQUIRED TO ENGAGE IN JUDICIAL-TYPE FACT-FINDING PRIOR TO IMPLEMENTING RACE-CONSCIOUS REMEDIAL MEASURES

In 1983, the Richmond City Council determined that race-conscious measures were needed to remedy past discrimination in Richmond's construction industry. This determination followed a review of well-documented evidence regarding nationwide discrimination in the construction trade, including local statistics, as well as a public hearing. The remedial measure implemented -- the Minority Business Utilization Plan -- required contractors with prime City contracts to subcontract at least 30% of the dollar amount of prime contracts to minority business enterprises.

This Court must now address the question of whether states and localities violate the Equal Protection Clause by initiating flexible and temporary remedial measures to eradicate the present effects of past discrimination in the construction trade without having engaged in judicial-type factfinding specifically identifying their own prior illegal discrimination.

Amici respectfully submit that even under the most rigorous scrutiny, the Richmond Plan must be upheld.[2] States and localities must be permitted to implement and maintain

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[2] This Court has not yet agreed on the appropriate level of scrutiny that should be applied for review of race-conscious remedial measures. *Paradise*, 107 S. Ct. at 1064 (plurality opinion). As Justice O'Connor has observed, however, the disparities between the various tests which have been articulated "do not preclude a fair measure of consensus." *Wygant*, 106 S. Ct. at 1853 (1986) (O'Connor, J., concurring). "In particular, as regards certain state interests commonly relied upon in formulating affirmative action programs the distinction between a 'compelling' and an 'important' government purpose may be a negligible one." *Id.*

programs like Richmond's to combat the pernicious effects of longstanding and pervasive discrimination in the construction industry. And, they must be permitted to do so without engaging in duplicative and costly factfinding that may involve admission of prior wrongdoing.

A. *States and Localities Have a Compelling Interest in Eradicating Discrimination and the Power and Duty to Adopt Race-Conscious Remedial Measures*

It is undisputed that the eradication of racial discrimination and its vestiges is a national policy of the "highest priority." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976). The Court has recognized the states' power and duty to eliminate the effects of discrimination through the use of race-conscious measures. *See, e.g., University of California Regents v. Bakke*, 438 U.S. 265, 366 (1977) ("*Bakke*"); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) (reapportionment). *See also Paradise*, 107 S.Ct. 1065; *id.* at 1075 (Powell, J., concurring); *Wygant*, 106 S. Ct. at 1856 (O'Connor, J., concurring).[3]

States may broadly delegate this authority to political subdivisions and to administrative or governmental units. *Bakke*, 438 U.S. at 366 n.42 (Brennan, White, Marshall, Blackmun, J.J.), *citing Sweezey v. New Hampshire*, 354 U.S. 234, 256 (1956) (Frankfurter, J., concurring) ("It would make the deepest inroads upon our federal system for the Court now to hold that it can determine the appropriate distribution of powers and delegation within the 48 states").[4]

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[3] Although Justice Powell suggests that Congress has a "unique constitutional role" in combatting racial discrimination, this cannot be construed to imply that the states have a lesser role. *See Fullilove*, 448 U.S. at 516. It can fairly be assumed that he meant "the power was 'notable' or 'unequaled', not 'sole' or 'exclusive' ". *Ohio Contractors Association v. Keip*, 713 F.2d 167, 172 (6th Cir. 1983).

[4] Many states have "home rule" provisions generally authorizing delegation to lesser political subdivisions. *See, e.g.*, N.Y. Const., Art. IX, § 2. The authority of localities to adopt anti-discriminatory measures is well supported. *See, e.g., McDaniel v. Barresi*, 402 U.S. 39 (1971); *Green v. County School Board*, 391

(Footnote continued)

The City of Richmond City Council has a compelling interest in remedying discrimination and is vested with the requisite authority to implement its race-conscious program.[5]

B. *States and Localities Should Not be Required to Engage in Contemporaneous Factfinding*

Like Congress, the Richmond City Council is empowered to legislate without compiling the type of record, or engaging in the level of factfinding required in judicial proceedings. *Fullilove*, 448 U.S. at 478 (Burger, J.); *see also id.* at 502 (Powell, J., concurring). As distinct from the courts, governmental bodies such as the City Council are accountable to their constituents, who can act as a check on arbitrariness. The level of discretion afforded legislative bodies is thus broader than that afforded the courts.[6]

Moreover, to require local governments to make contemporaneous findings of fact and compile judicial-type records, as the Fourth Circuit did, thwarts the objective of eradicating racial discrimination and its vestiges and undermines the ability of local legislatures to implement policy and to most efficiently

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U.S. 430 (1968) (school boards); *South Fla. Chapter v. Metropolitan Dade County*, 723 F.2d 846, 852 (11th Cir. 1984), *cert. denied*, 469 U.S. 871, (1984) (county); *Ohio Contractors Association v. Keip*, 713 F.2d at 172 (general assembly); *Schmidt v. Oakland Unified School District*, 662 F.2d 550 (9th Cir. 1981), *vacated and remanded on other grounds*, 457 U.S. 594 (1982) (school district).

[5] In its first opinion, the Fourth Circuit specifically held that Richmond acted pursuant to delegated powers. *See* Supplemental Appendices to Jurisdictional Statement ("J.S. Supp. App.") at 20. The second opinion implicitly upheld this earlier finding.

[6] *See* Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 Yale L.J. 635, 642 (1982) ("The discretion of judges – particularly Article III federal judges – is properly limited because of their insulation from political control); *cf. Bi-Metallic Co. v. Colorado*, 239 U.S. 441, 445 (1915) (legislature entitled to act without public input because public's "rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule").

use limited resources. *See generally Wygant*, 106 S.Ct. at 1855 (O'Connor, J., concurring). *See also Fullilove*, 448 U.S. at 502 (Powell, J.) ("the creation of . . . rules for the governance of society simply does not entail the same concept of record-making that is appropriate to a judicial or administrative proceeding").

Both the Court and Congress have consistently emphasized the value of voluntary efforts in ending racial discrimination. *Local No. 93 v. City of Cleveland*, 106 S. Ct. 3063, 3072 (1986); *Johnson v. Transportation Agency*, 107 S.Ct. 1442, 1452 n.8, 1453 ("*Johnson*"); *Wygant*, 106 S.Ct. at 1855 (O'Connor, J., concurring); *Bakke*, 438 U.S. at 336-38 (Brennan, White, Marshall, Blackmun, J.J.) (referring to emphasis on voluntariness in Titles VI and VII of the Civil Rights Act). *See also Steelworkers v. Weber*, 443 U.S. 193, 204 (1978) ("*Weber*"). Voluntary implementation of affirmative action programs by public employers is particularly important. These programs serve as models for private employers and include minorities, who might otherwise feel disenfranchised, in an aspect of government. *Wygant*, 106 S.Ct. at 1855 (O'Connor, J. concurring) (citing the amendments extending coverage of Title VII to the states).[7]

Localities, however, will clearly be discouraged from adopting voluntary remedial measures such as affirmative action plans and set-aside programs if those measures must be preceded by factfinding demonstrating that they have engaged in illegal discrimination. *Id.*; *Bakke*, 438 U.S. at 364 (Brennan,

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[7] *Cf. Olmstead v. United States*, 277 U.S. 438,458 (Brandeis, J., dissenting) ("Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example").

To the extent that state procedure and structure has sometimes been criticized as "reinforcing the tendency of majorities to tyrannize minorities," voluntary actions by these governmental units should especially be encouraged. *Assoc. Gen. Contractors v. City of San Francisco*, 813 F.2d 922, 929 (9th Cir.1987) (*quoting* Note, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 Yale L.J. 1403, 1410 (1982)).

White, Marshall, Blackmun, J.J.)[8] In developing this record, localities might not only fuel existing racial tensions, but would expose themselves to potential liability for prior discrimination.[9] For large public employers like New York State, contemporaneous factfinding would be particularly destructive, and the requirement therefore self-defeating.

Requiring contemporaneous factfinding would further deter the implementation of voluntary programs because it would significantly drain the resources of states and localities, which typically operate on a smaller and less formal scale than do Congress or the courts and which often do not maintain detailed records.[10]

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[8] This Court has heretofore not required actors implementing affirmative plans to demonstrate their own discriminatory conduct. As discussed below, Congress made no such finding before adopting the federal MBE plan approved in *Fullilove*. And, under Title VII, for which the standard of review of affirmative action plans is similar to that under the Equal Protection Clause, an employer is not required to show a violation to justify its affirmative action plan. *See Johnson*, 107 S. Ct. at 1451; *see also id.* at 1442 (Scalia, J., dissenting) (comparing Title VII and Equal Protection); *id.* at 1461 (O'Connor, J., concurring)(same).

[9] *Cf. Johnson*, 107 S.Ct. at 1453 ("A corporation concerned with maximizing return on investment ... is hardly likely to adopt a plan if in order to do so it must compile evidence that could be used to subject it to a colorable Title VII suit").

In other contexts, for the same policy reasons, voluntary efforts to remedy wrongdoing cannot be used as a basis for liability. For example, under the Federal Rules of Evidence, evidence of post remedial repairs, which would necessarily reflect past neglect or wrongdoing, is deemed inadmissible. *See* Fed. R. Civ. P. §§ 407; 408; Weinstein, *Evidence* § 407[02] (1986). The purpose of these rules is to promote the social policy encouraging the adoption of safety measures and repairs. In this case, the Richmond City Council expressed concern that its enactment of a remedial plan would be construed as an admission of past liability. Further findings of liability would have clearly deterred it from adopting the plan. *Hearing on Adoption of Minority Business Utilization Plan, Richmond City Council*, April 11, 1983. Joint Appendix ("J.A.") at 15.

[10] *See, e.g., May v. Cooperman*, 572 F. Supp. 1516, 1564 (D. N.J. 1983), *aff'd*, 780 F.2d 240 (3d Cir. 1985) (N.J. legislature does not maintain records of

(Footnote continued)

Accordingly, states and localities should not be required to engage in contemporaneous factfinding prior to implementing a remedial plan. Rather, the local legislative body must have a "firm basis" for believing that remedial action is needed. *Wygant*, 106 S.Ct. at 1856 (O'Connor, J., concurring).[11] As discussed below, local legislatures must be accorded broad latitude in evaluating evidence and deeming it sufficient to support the determination that a plan is needed.

C. *In Allocating the Burden of Proof, the Challenger Should be Required to Demonstrate the Illegality of the Locality's Plan*

If the plan is challenged after its enactment, the appropriate allocation of the burden of that proof is for plaintiffs to bear the burden of demonstrating their rights have been violated. *Id.* Accordingly, the state or locality should not bear the burden of demonstrating its constitutionality.[12] Nor should the

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hearings and debates). *See also S.W. Washington Chapter, National Electrical Contractors Association v. Pierce*, 100 Wash. 2d. 109, 667 P.2d 1092, 1110 n.2 (1983) ("Local legislative bodies ... cannot be expected to undertake the expense of detailed recordkeeping comparable to that of Congress, which operates on a national scale"); *cf. Oregon v. Mitchell*, 400 U.S. 112, 195 (1970) (Harlan, J., dissenting) (scant availability of official state materials on adoption of fourteenth amendment as compared with available federal materials); *see also* Note, *Principles of Competence: The Ability of Public Institutions to Adopt Remedial Affirmative Action Plans*, 53 U.Chi.L.Rev. 581, 614 (1986).

[11] In *Fullilove*, Justice Powell suggested a lower standard, stating that Congress can act if it "perceives a basis" and the reviewing Court "should uphold a reasonable congressional finding of discrimination." 448 U.S. at 504 n.4 (Powell, J., concurring).

In addition, the development of evidence demonstrating the need for a program naturally continues after a program is enacted; as part of their function, state agencies responsible for monitoring compliance with the program gather information and facts evincing the necessity for the program. This evidence should be sufficient to rebut a challenge to a program's constitutionality.

[12] In addition, a presumption of validity necessarily attaches to legislation. *See, e.g., Schlib v. Kuebel*, 404 U.S. 357, 371 (1971); *McGowan v. Maryland*, 366 U.S. 420, 425 (1960); *Davies Warehouse Co. v. Bowles*, 321 U.S. 144 (1943).

governmental unit then be required to demonstrate prior unlawful discrimination; the challenger must maintain the "ultimate burden to demonstrate the unconstitutionality" of the plan. Only by meeting this burden can the challenger rebut the presumption that the plan had a firm basis. *Wygant*, 106 S.Ct. at 1849; *id.* at 1856 (O'Connor, J. concurring). Under this approach, the reviewing court is not required to make a finding of prior discrimination to uphold the plan. *Id.*

This allocation of the burden of proof is additionally appropriate because it takes into account the remedial purpose underlying a locality's implementation of a program and its efforts to redress past discrimination. *See generally United Jewish Organizations v. Carey*, 430 U.S. at 161 n.19 (discussing burden of proof under Voting Rights Act which inures to benefit of individuals long discriminated against).

D. *Localities Should be Accorded Latitude in Determining that a Need for a Remedial Measure Exists*

In *Fullilove*, a plurality of the Court found Congress's findings of discrimination sufficient to uphold the federal MBE provision. In examining the legislative history of this provision, the Court referred to the ample historical evidence Congress had before it evincing discrimination against minority businesses, and of prior legislative and administrative programs intended to ameliorate discrimination, of which Congress was aware. *Fullilove*, 448 U.S. at 468, 478 (Burger, C.J.); *id.* at 503 (Powell, J., concurring). Justice Powell wrote,

> [Congress's] special attribute as a legislative body lies in its . . . mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce

> the need for fresh hearings or prolonged debate when Congress again considers action in that area.

Fullilove, 448 U.S. at 503 (Powell, J., concurring). The Court upheld the plan despite the lack of specific findings as to past discrimination by Congress in its distribution of public contracts. *See Fullilove*, 448 U.S. at 540 (Stevens, J., dissenting) ("The legislative history of the Act does not tell us when, or how often, any minority business enterprise was denied such access"); *see also id.* at 527 (Stewart, J., dissenting). The same latitude must be accorded local legislatures in determining that there is a need for a local affirmative action or MBE plan.

The longstanding history of discrimination in the construction industry has been recognized by the Court, Congress, the President and the states. For example, this Court has observed that the exclusion of blacks from the "crafts" unions -- the entry point and training ground for skilled construction workers -- is so commonplace as to warrant this Court's "judicial notice." *Weber*, 443 U.S. at 198 n.1. And, as chronicled in *Fullilove*, the 1977 Public Works Employment Act ("PWEA") followed prior executive and congressional efforts to combat discrimination in minority businesses. *See Fullilove*, 448 U.S. at 457-463 (Burger, C.J.).[13]

In addition to referring to the legislative history of the Public Works Employment Act, general findings of societal discrimination and the long history of discrimination in the construction industry, the Court specifically referred to the "direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect to state and local construction contracting." *Fullilove*, 448 U.S. at 478 (Burger, C.J.).

Localities must be able to rely on these abundant findings of discrimination in the construction industry as a basis for their MBE programs; to view them as irrelevant would indeed be

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[13] *See also Assoc. General Contractors v. Altshuler*, 490 F.2d 9; 12 n.1; 11-14 (1st Cir. 1973), *cert denied*, 416 U.S. 957 (1971) (discussing history of discrimination and referring to scholarly works).

"myopic."[14] Duplication of factfinding by the federal and state branches is clearly wasteful and unnecessary, particularly given the evidence Congress culled regarding state and local construction contracts.[15] Requiring such duplication similarly ignores the highly pertinent experience and expertise that Congress has gained in this area. *Cf. Fullilove*, 448 U.S. at 503 (Powell, J., concurring). Moreover, in at least one other context, the Court has approved the reliance of cities on relevant findings made by other cities.[16] Similarly, since it is appropriate for a state to rely on federal policy to inform its own policy choices,[17] it is *a fortiori* appropriate for a state to rely on congressional findings.

Finally, localities should be able to rely on the congressional findings to support MBE programs for public construction programs, not because they wish to eradicate broad societal discrimination, but because it is in within their power to address a limited field in which the discrimination has been amply documented. *Cf. Wygant*, 106 S. Ct. at 1846.

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[14] *Cf. M.C. West, Inc. v. Lewis*, 522 F.Supp. 338, 349 (M.D. Tenn. 1981) (upholding Secretary of Transportation's federal highway MBE program).

[15] Furthermore, the potential overlap between Congress's factfinding and that of the state reflects that under our system of government, there may be "a multiplicity of agents and institutions performing the same functions." This suggests the utility of shared reliance on information and minimizing duplication of resources. *Compare* Cover, *Dispute Resolution: A Forward*, 88 Yale L.J. 910, 913 (1979) (positing the idea of blurring the functions of courts and administrative bodies). *Amici* nonetheless recognize that each branch of government may apply data differently depending on those affected.

[16] *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986)(in an area involving first amendment rights, a city is "entitled to rely on the experiences of...other cities, and in particular on [other] 'detailed findings'... The first amendment does not require a city, before enacting...an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses").

[17] *See, e.g., Plyler v. Doe*, 457 U.S. 202, 251 (1981) (Congress's exclusion of individuals from particular social welfare programs may provide policy basis for same state action).

1. *Localities Should Not Be Restricted In the Type of Evidence They May Consider as a Basis for a Race-Conscious Program*

Localities should not be compelled to justify their programs based on a fixed mathematical formula.[18] Furthermore, while localities could appropriately rely solely on congressional findings, other findings may provide them with a sufficient basis for determining that implementation of a race-conscious program is warranted to remedy past discrimination. This evidence may include pending lawsuits; court orders; testimonial evidence; earlier studies by committees; investigations; comments received in response to the publication of a rule; and unemployment statistics and census data.[19]

2. *States and Localities May Have Compelling Interests in Implementing Race-Conscious Measures Aside From Remedying Past Discrimination*

Race-conscious construction programs may additionally be justified on grounds other than the need for remediating prior

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[18] *Accord Alexander v. Louisiana*, 405 U.S. 625, 629-31 (1971). In the jury context, for example, the Court stressed that "the Court has never announced mathematical standards for the demonstration of 'systematic' exclusion of blacks, but has, rather, emphasized that a factual inquiry is necessary in each case that takes into account all possible explanatory factors." *But see, e.g., J. Edinger & Son v. City of Louisville, Kentucky*, 802 F.2d 213 (6th Cir. 1986) (citing *Wygant* to support proposition that fixed formula must be used to demonstrate prior discrimination).

[19] *See, e.g., Ohio Contractors v. Keip*, 713 F.2d at 17 (awareness of litigation, executive department investigations; earlier studies by committees); *M.C. West, Inc. v. Lewis*, 522 F. Supp. at 347 (comments responding to publication of rule); *South Fla. v. Dade County*, 723 F.2d at 846 (reference to past discrimination). *See also Fullilove*, 448 U.S. at 540 (Stevens, J.) (evidence of litigated claims on behalf of MBEs could provide basis). *See generally* Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. Chi. L. Rev. 213, 217 n.9 (1986) (suggesting use of unemployment statistics and census data). States should be able to engage in extensive factfinding if they so choose, and to draw from the experience of other states in engaging in this factfinding.

discrimination. In *Bakke*, for example, Justice Powell found that "the attainment of a diverse student body" justified the use of racial criteria. *See Bakke*, 438 U.S. at 311-314 (Powell, J.);[20] *see also Wygant*, 106 S. Ct. at 1868 (Stevens, J., dissenting) (noting benefits of an integrated faculty); *Johnson*, 107 S. Ct. at 1460 (Stevens, J., dissenting) ("statutes enacted for the benefit of minority groups should not block these forward-looking considerations").

In *Wygant*, Justice O'Connor stated,

> Certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have not been passed on here to be sufficiently "important" or "compelling" to sustain the use of affirmative action policies.

Id. at 1853. In evaluating these "other governmental interests," however, the Court should recognize the unique ability of localities to evaluate the purposes that would be served by race-conscious measures.[21] For example, in enacting a publicly funded construction project, the State of Massachusetts emphasized the desirability of concentrating minority employment in projects in or near minority neighborhoods. The plan was therefore designed not only to increase minority employment, but to alter "the geographic distribution of placements." *Assoc. General Contractors v. Altshuler*, 490 F.2d at 14 n.10. Such interests should be deemed sufficiently weighty by this Court to uphold a plan.

3. *The Findings Supporting Richmond's Enactment are Sufficient to Uphold It*

The City of Richmond had a "firm basis" upon which to conclude that a remedial plan was needed. Moreover, Richmond's

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[20] Justice Powell relied, at least in part, on statements by a University President to justify this finding. *Id.* at 312 n.48.

[21] *Cf. Oregon v. Mitchell*, 400 U.S. at 207 (Harlan, J., dissenting) (discussing states' ability to evaluate local needs); *see generally*, Point II, *post*.

findings were sufficient to satisfy even the most exacting level of scrutiny. The City determined that Richmond shared the nation's problems of discrimination in the construction industry. J.A. at 41. The City Council conducted a vigorous debate, hearing from at least seven witnesses who spoke for and against the plan, including an MBE owner and members of contracting associations. *See* Hearing; Jurisdictional Statement, Appendix A, ("J.S. App.") at 6a. The City Council heard extensive testimony that the construction trade associations in Richmond contained virtually no black members. J.S. App. at 17a. And, none of the witnesses opposing the plan disputed the existence of discrimination in the construction industry, although denying that their individual associations engaged in discrimination. The City also reviewed historical records of city contracting, as well as a statistical study which demonstrated that while minorities composed half the City's population, they had received less than 1% of the City's contracting business.

Upon this basis, the City was fully justified in enacting its program.

POINT II

THE CITY OF RICHMOND'S MBE SET-ASIDE PROGRAM IS NARROWLY TAILORED TO ACCOMPLISH ITS PURPOSE

This Court has said on more than one occasion that race-conscious remedial measures, in order to survive constitutional scrutiny, must be narrowly tailored to achieve their goals. *Wygant*, 106 S. Ct. at 1846, *quoting*, *Fullilove*, 448 U.S. at 480. At the same time, this Court has taken care to note that remedial plans need not be limited to the least restrictive means of implementation. *Paradise*, 107 S. Ct. at 1073, *citing*, *Fullilove*, 448 U.S. at 509 (Powell, J., concurring). *Paradise* involved the power of a trial court to fashion appropriate race-conscious remedies, but the same considerations support giving states and localities breadth and flexibility in fashioning remedies to redress past discrimination. *See* above, point I, D. Like the courts, states and localities are "in the best position to judge whether an alternative remedy ... would have been effective ... in ending discriminatory practices," *Local 28 Sheet Metal Workers v. E.E.O.C.*, 106 S. Ct. 3019, 3056 (1986), (Powell, J., concurring), and to assess whether or not a particular race-conscious program is appropriate.

In determining the constitutionality of the means selected, this Court has examined a variety of factors. These include: (1) efficacy of alternative remedies and necessity for the relief; (2) duration of relief; (3) relationship between percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force; (4) flexibility and availability of waiver provisions; (5) impact of the relief on the rights of third parties. *Paradise*, 107 S. Ct. at 1067-73; *Fullilove*, 448 U.S. at 511-16 (Powell, J., concurring); *see also Wygant*, 106 S. Ct. at 1850-52; *id.* at 1857 (O'Connor, J., concurring).

The Fourth Circuit focused on the last three criteria to support its determination that the City's plan was not sufficiently

narrowly tailored. As shown below, however, the MBE set-aside provision falls well within the permissible range of the City of Richmond's authority.

A. *Relationship between Percentage of Minority Subcontractors and the Relevant Population or Workforce*

In *Fullilove*, Justice Powell found the percentage chosen for the set-aside program to be within the scope of congressional discretion. *Fullilove*, 448 U.S. at 514 (Powell, J., concurring). The 10% set-aside figure in the federal PWEA represented an approximate midpoint between the percentage of minority contractors and the percentage of minority group members in the nation. *Id.* at 514-15. In the Richmond City Council's hearing, testimony revealed that blacks constituted less than one percent of construction contractors involved in all crafts, which was roughly equivalent to the percentage of minorities awarded city construction contracts. J.S. App. at 20a. In determining the proper percentage for the set-aside, the City Council determined that a figure roughly halfway between less than one percent and the fifty percent minority in the population of Richmond would be appropriate.

The set-aside "necessarily involve[d] a degree of approximation and imprecision" as did the interim promotion goal set in *Paradise*. *Paradise*, 107 S. Ct. at 1072 (Powell, J., concurring), *quoting*, *Teamsters v. United States*, 431 U.S. 324, 372 (1977) ("*Teamsters*"). In *Paradise*, Justice Powell recognized that the district court, which had set the one-black-to-one-white promotion ratio, had first-hand knowledge of the parties and the potential for resistance, and imposed the requirement that it determined would compensate for past delay and prevent future recalcitrance, while not unduly burdening the interests of the non-minorities. To do less, the district court determined, would have perpetuated the effects of past discrimination. Similarly, the City of Richmond, having first-hand knowledge of the potential for resistance to minorities in the construction industry, made

a reasonable determination that a 30% set-aside was necessary to undo the past effects of discrimination.[22]

B. *Flexibility and Availability of Waiver Provisions*

The Richmond plan anticipates situations where an MBE is "not available or unwilling to participate in the contract to enable [the prime contractor] meeting the 30% MBE goal." J.S. Supp. App. at 51. The plan included as an "unwilling" MBE, one that, enjoying a monopoly on the market, submitted inflated bids. *See* J.S. Supp. App. at 52-53. In such a situation, the prime contractor could request a total or partial waiver of the 30% requirement. J.S. Supp. App. at 67-68.

The Richmond plan includes broader administrative relief than that upheld in *Fullilove*. Although the federal plan had a waiver provision for grantees, a non-grantee did not have standing to challenge the grant to an MBE. In contrast, the Richmond plan allows non-grantees standing to challenge the qualifications of an MBE as a minority enterprise. J.S. Supp. App. at 13 n.5. Finally, prime contractors are given assistance in locating MBEs. If no qualified minority candidate is available, the requirement may be waived. *Id.* at 67-68.

In sum, the flexibility written into the Richmond plan is at the very least, similar to that approved by this Court in *Fullilove*.

C. *Impact of the Relief on the Rights of Third Parties*

Before approving a race-conscious remedy, consideration must be given to the effect of the remedy on innocent third parties. *See Teamsters*, 431 U.S. at 374-75. However, the mere existence of such an effect should not prevent implementation of the remedy because, as this Court has recognized, "[a]s part of this Nation's dedication to eradicating racial discrimination, innocent

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[22] Alternatively, the 30% set aside can be seen as a means by which the City Council sought to regulate the speed by which a reasonable proportion of minority subcontractors would be brought into the market. *See Paradise*, 107 S. Ct. at 1071 (Powell, J., concurring).

persons may be called upon to bear some of the burden of the remedy." *Wygant*, 106 S. Ct. at 1850 (Powell, J., joined by Burger, C.J. and Rehnquist, J.) Chief Justice Burger's observations in *Fullilove* are pertinent here:

> The actual "burden" shouldered by nonminority firms is relatively light in this connection when we consider the scope of this public works programs as compared with overall construction contracting opportunities. Moreover, although we may assume that the complaining parties are innocent of any discriminatory conduct, it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.

Fullilove, 448 U.S. at 485-86.

The *Wygant* plurality found preferential lay-offs to be an impermissible burden on innocent third parties, and found the remedial plan unconstitutional. In doing so, Justice Powell contrasted the *Wygant* preferential lay-off scheme and the *Fullilove* set-aside, noting that in the latter, the "actual burden shouldered by non-minority firms is relatively light." *Wygant*, 106 S.Ct at 1850-51.[23]

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[23] In contrasting the effect of lay-off plans and those of hiring goals, Justice Powell remarked:

> the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.

Id. at 1851. The burden on non-minorities imposed by set-aside programs is even less than that imposed by hiring goals, as hiring goals completely delay an opportunity for a job, whereas a set-aside only affects a portion of the contracts a contractor or subcontractor may receive.

The burden on innocent parties is further limited in the Richmond plan as the set-aside only involves 30% of the subcontracting for city construction projects. This leaves the level of minority participation in prime construction contracting untouched. Consequently, it imposes a diffuse burden and does not disproportionately harm the interests or unnecessarily trammel the rights of innocent individuals. *Paradise*, 107 S. Ct. at 1073; *Wygant*, 106 S. Ct. at 1853-54 (O'Connor, J., concurring).

POINT III

STATE PROGRAMS AND FEDERALLY FUNDED PROGRAMS SHOULD NOT BE REVIEWED ACCORDING TO DIFFERENT STANDARDS

As discussed above, this Court has recognized the necessity of according Congress broad discretion in adopting race-conscious remedial measures. To subject state and local cities to more rigorous standards in their adoption of similar measures would indeed be anomalous. The folly of applying dual standards of review to state or local MBE programs and federally-funded MBE programs is most striking when considered in the context of federal grant programs. Under these programs, state and local governments must have set-asides to receive federal funds.[24]

Assuming *arguendo* that the stricter standards are applied only to state and local MBE programs, *amici* will, on the one hand, be required to have set-asides in their federally funded projects to receive federal funding while, on the other hand, be deterred from implementing the same or similar MBE programs for their projects. This result is particularly illogical given that the construction industry with whom the state contracts for its own projects is the same industry with whom it contracts for its partially federally funded programs, and the same industry which has a documented history of discrimination.[25]

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[24] *See, e.g.*, 42 U.S.C. § 6705(f)(2) (Public Works Employment Act requires state and local government grantees to spend at least 10% of the grant for MBE's).

[25] *But see Illinois Builders Association v. Ogilvie*, 327 F. Supp. 1154 (S.D. Ill. 1971), *aff'd*, 471 F.2d 680 (7th Cir. 1972) (federal government has relied upon a plan originally conceived by state officials for their own state funded contracts indicating that state and federal findings would be the same). Moreover, taken to its conclusion, the dual requirements would mean that if the federal government withdrew funding from a partially-federally funded project, the state would then have to engage in rigorous factfinding to continue contracting with the existing work-force. *Compare Kromnick v. School District of Philadelphia*, 739 F.2d 894, 899, 905 (3d Cir. 1984) (in school desegregation case, when federal phase of project ended, school board continued remedial policy in absence of specific findings or consideration of alternative remedies).

CONCLUSION

For the reasons set forth above, the judgment of the court of appeals should be reversed.

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April 21, 1988

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